(2)

No. 99-1272

IN THE

Supreme Court of the United States

INVESTORS GUARANTY FUND, LTD.,

Petitioner,

v.

MORGAN STANLEY & CO. INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

C. JOSEPH LAUGHON, II
Counsel of Record
ROBERT PENCHINA
LAURA M. BERGAMINI
CLIFFORD CHANCE ROGERS
& WELLS LLP
Attorneys for Respondent
200 Park Avenue
New York, New York 10166
(212)878-8000

158221

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

24PP

COUNTER STATEMENT OF QUESTION PRESENTED

Respondent objects to the Question Presented because Petitioner incorrectly asserts that the Southern District of New York and the Second Circuit disregarded this Court's precedent by a misapplication of the standard for summary judgment. Contrary to the Question Presented, the district court and the Second Circuit properly considered all of the evidence in the light most favorable to Petitioner and did not make rulings on the credibility of any conflicting evidence. Petitioner does not argue that the courts below adopted a new standard of summary judgment. Instead the petition is based entirely on the premise that a properly stated rule of law was misapplied.

Respondent therefore submits that the question presented should be: Whether the United States District Court for the Southern District of New York correctly stated and applied well-settled and longstanding principles for summary judgment which conform fully to the standards of Federal Rule of Civil Procedure 56 and the precedents of the United States Supreme Court.

LIST OF PARTIES

In addition to the parties listed in the petition, Petitioner's complaint lists John Does 1-10 as defendants. The Petitioner did not pursue its claims against these defendants before the district court or the Second Circuit. The only Respondent is Morgan Stanley & Co. Incorporated.

Morgan Stanley & Co. Incorporated is the wholly owned subsidiary of its direct parent Morgan Stanley Dean Witter & Co.

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COUNTERSTATEMENT OF STATUTES INVOLVED

No statute is directly involved in this matter. Petitioner misstates that 28 U.S.C. § 1291 and 28 U.S.C. § 1254 are statutory provisions involved. In fact, those statutes were not, by definition, raised in any proceeding below and are not at issue here.

COUNTERSTATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15 and 24, Respondent supplements the statement of the case and addresses the following misstatements of fact in the petition. Investors Guaranty Fund, Ltd. ("IGF" or "Petitioner") filed an unverified complaint against Morgan Stanley & Co. Incorporated ("Morgan Stanley") alleging misappropriation of a confidential and proprietary financial "system" for securitizing catastrophic insurance risks. IGF alleged that it disclosed this system to Morgan Stanley and other major investment banks.[1] When, after being directed to do so by the district court, IGF finally answered Morgan Stanley's interrogatory asking IGF to identify its proprietary system, IGF listed "four distinct characteristics or elements" of its system: (1) securitization of risk; (2) collateralizing risk transfer; (3) a conversion platform; and (4) an absorption security. IGF did not contend in its interrogatory answers,

1. IGF contended that it disclosed its system to Morgan Stanley in a June 1995 meeting, under "confidentiality, proprietary, trade secret acceptance conditions." (A-12). It also alleged that it had similar meetings and agreements with other investment banks. Despite Morgan Stanley's discovery efforts to obtain evidence of these purported agreements, IGF objected and refused to produce any such evidence.

which also were unverified, that its system was novel or original or that it would confer a competitive advantage upon the user.

In November 1995, the California Earthquake Authority ("CEA"), a California privately funded/publicly managed risk pool, solicited proposals to structure and underwrite catastrophe bonds to cover the insurance risks from earthquakes. Morgan Stanley and at least nine other major investment banks independently submitted proposals, all of which had elements similar to IGF's system. In fact, every element identified by IGF as comprising its system also was included in the CS First Boston and Goldman Sachs proposals. The CEA selected Morgan Stanley to serve as lead underwriter for the proposed bond offering. The CEA eventually abandoned its plans to issue catastrophe bonds and instead opted for a traditional reinsurance mechanism. The record contains no evidence regarding why the CEA selected Morgan Stanley or why it abandoned its planned bond issue. (A-13).

At no time during permitted fact discovery, which ended pursuant to the parties' Joint Discovery Plan on October 15, 1997, did IGF notice any depositions. The Joint Discovery Plan also required IGF to serve expert reports on Morgan Stanley by November 17, 1997. IGF failed to designate any experts or serve any reports on Morgan Stanley. Morgan Stanley identified Dr. Froot as its expert and timely served his report by December 17, 1997, in accordance with the Joint Discovery Plan. Dr. Froot's report detailed why IGF's system was neither novel and original nor conferred any competitive advantage.

On December 19, 1997, Morgan Stanley filed its motion for summary judgment. Dr. Froot submitted evidence that the IGF identified elements of its purportedly proprietary system had been used together in financial products before IGF's disclosure of its system to Morgan Stanley and also appeared in academic papers published prior to the June 1995 meeting between IGF and Morgan Stanley. Dr. Froot also demonstrated that the IGF system could not have provided a competitive advantage because other investment banks had submitted proposals to the CEA that were substantially similar if not identical to Morgan Stanley's proposal. Although the Joint Discovery Plan permitted depositions of experts until February 2, 1998, IGF chose not to notice the deposition of Dr. Froot.

IGF's opposition to Morgan Stanley's motion for summary judgment relied on declarations by three of its principals, Douglas King, Douglas Love and Dennis Szal. Although IGF had neither designated these individuals as experts nor submitted expert reports required under Federal Rule of Civil Procedure 26(B)(2) and the Joint Discovery Plan entered by the district court, IGF argued that its principals' declarations should be considered as "expert" testimony. Even though these declarations did not qualify as expert testimony, the district court nevertheless considered them. The court determined that the declarations of the IGF principals did not include any admissible evidence sufficient to raise a genuine issue of material fact as to Dr. Froot's testimony that IGF's system was neither novel and original nor conferred a competitive advantage. In addition, in an attempt to rebut

Dr. Froot's testimony that the system was not novel or original because its elements were contained in the proposals of other investment banks, IGF contended for the first time that it had confidentially disclosed its system to those other investment banks, in addition to Morgan Stanley.

The district court heard oral argument on June 15, 1998. Seventeen days after argument, IGF filed a motion to supplement the record with a verified copy of IGF's answers to Morgan Stanley's First Set of Interrogatories and a supplemental declaration of Mr. King, which attached two purportedly "new" case studies co-authored by Dr. Froot which were both available well prior to oral argument.[2]

On December 23, 1998, the district court issued its Opinion and Order granting Morgan Stanley's motion for summary judgment. The court's opinion reflected its thorough review and analysis of all of the declarations submitted.[3]

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2. One study, dated November 5, 1997, was referred to in Dr. Froot's expert report and appeared on his curriculum vitae, which had been provided to IGF with his December 17, 1997 expert report. (A-14). The second was published in March 1998, well prior to oral argument. (A-14). Had IGF elected to depose Dr. Froot it could have questioned him regarding such studies. Instead it chose to forego its opportunity to do so.

3. Although the district court denied the motion to supplement the record, the district court nonetheless reviewed the proffered supplemental materials and expressly found them unhelpful. (A-14 – A-15).

IGF appealed to the Court of Appeals for the Second Circuit. The parties submitted briefs fully explaining their positions and oral argument was heard on October 14, 1999. On November 1, 1999, the Second Circuit affirmed the district court's grant of summary judgment for "substantially the reasons stated by the district court." (A-17). Although IGF now complains that it was given "short shrift justice" by the Second Circuit, the Petitioner did not avail itself of the opportunities to address this issue before that court. For example, it failed to seek reconsideration or an en banc review of the Second Circuit's opinion. Thus, IGF now seeks this Court's review of the Second Circuit's purported "short shrift justice" without having attempted to exhaust the remedies available below or creating a record on this issue.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of a grant of summary judgment in Morgan Stanley's favor which was based on correctly stated and applied principles of well-settled law. Rule 10 of the Supreme Court Rules states that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Such reasons may include conflicting decisions between courts on an important matter; unsettled questions of national importance to the administration of federal law; or resolution of an important federal question in a way that conflicts with Supreme Court precedent. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). If the question presented by a petition for a writ of certiorari is important only to the parties and not to the general public, the petition should be denied. *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Further, "[a] petition for writ of certiorari is rarely granted when asserted error consists of erroneous factual

findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. As this case involves a proper application of well-settled summary judgment principles, review by this Court is both unnecessary and unwarranted.

IGF's fact-specific petition points to no conflict among the circuits, no unsettled question of national importance, and no gross misstatement or misapplication of the law. IGF does not even challenge the application of the substantive law by the district court or the Court of Appeals. Rather, in essence, IGF urges this Court to review the decisions below merely to correct a perceived misapplication of the summary judgment standard. While IGF may be disappointed that summary judgment was granted to Morgan Stanley, the district court correctly stated and applied the Second Circuit summary judgment standard which comports fully with the precedent of this Court. Even if, assuming arguendo, the court below erred in its application of the summary judgment standard, this Court should decline to review the decision because such a fact intensive exercise would neither resolve any conflict among the courts nor determine any important issue of public interest.

I.

THE USE OF SUMMARY DECISIONS BY THE COURTS OF APPEALS IS NOT AN UNSETTLED ISSUE OF PUBLIC IMPORTANCE WORTHY OF SUPREME COURT REVIEW.

IGF raised for the first time in its Petition for Certiorari an issue concerning a Second Circuit practice of using summary orders. The record in this case is completely bereft of evidence of the perceived problem with summary orders

and in fact, IGF did not take the opportunity to raise the issue before the Second Circuit. In any event, despite Petitioner's criticisms, summary affirmances by the courts of appeals do not undermine a litigant's right to a fair trial. To the contrary, a litigant before the court of appeals has no right to a written opinion and a judgment entered in the absence of a written opinion does not deny the litigant due process.[4] *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (per curiam) ("[T]he courts of appeals should have wide latitude in their decisions of whether or how to write opinions. That is especially true with respect to summary affirmances."); *see also Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983); *United States v. Baynes*, 548 F.2d 481, 483 (3d Cir. 1977). Moreover, the Federal Rules of Appellate Procedure do not require the courts of appeals to issue written opinions. *See* Fed. R. App. P. 36. Rather 28 U.S.C. § 46(c) merely requires that the cases be "heard and determined." The Second Circuit Rules, as well as the rules of other courts of appeals specifically authorize this practice when the circuit court determines that a written opinion would be of no precedential value.[5]

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4. While IGF contends that the summary judgment standard creates tension between a litigant's constitutional right to a fair trial and the court's efficient disposal of frivolous claims (Pet'r Brief at 8), it should be noted that there is no constitutional right to an appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The perceived "right to an appeal" is provided by statute, which gives the courts of appeals "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291.

5. *See, e.g.*, 1st Cir. R. 36; 2d Cir. R. 0.23; 3d Cir. R. 10.6; 4th Cir. R. 27(f); 5th Cir. R. 47; 6th Cir. R. 36; 7th Cir. R. 53; 8th Cir. R. 47B; 9th Cir. R. 36-1; 10th Cir. R. 36.1; 11th Cir. R. 36-1; D.C. Cir. R. 36(b); Fed. Cir. R. 36. The relevant rule for the Second Circuit provides, in pertinent part:

(Cont'd)

These procedures are especially useful where, as here, the appeal is meritless because the lower court was plainly correct in its decision. *See* Robert M. Parker and Ron Chapman, Jr., Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived, 50 *SMU L. Rev.* 573, 574 (1997). While IGF attempts to magnify the perceived problem to a national crisis by stating that this Court must "insure compliance with its controlling law and put an end to short-shrift justice at the altar of case disposition" (Pet'r Brief at 9), its criticism of summary opinions is unsubstantiated. The single article cited by IGF hardly equates to a public outcry for reform. Here, there was a thorough opinion by the district court. In fact, the district court's opinion set forth a number of independently sufficient grounds to support its judgment. (The district court concluded that Dr. Froot's testimony established three separate reasons why IGF's system was not novel and original as well as establishing that the system conferred no competitive advantage. (A-7 – A-13).) There simply is nothing in the record before this Court to show that IGF, let alone parties in any other cases, have received "short shrift justice" by the Second Circuit.

(Cont'd)

> The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

2d Cir. R. 0.23.

To the contrary, in this case the Petitioner received full consideration and review by the courts below. The district court heard oral argument on Morgan Stanley's summary judgment motion and issued a written opinion with extensive citations and thorough analysis of the evidence. On appeal, the Second Circuit also heard oral argument and affirmed for substantially the reasons stated by the district court. The Second Circuit's opinion, though brief, is sufficient to apprise IGF of the reasons for affirmance because it adopted the reasoning of the district court. Therefore, IGF is fully aware of the reasons that the district court granted summary judgment and that the Second Circuit affirmed. IGF thus cannot complain that it lacks understanding of the Second Circuit's decision. (Pet'r Brief at 9).

Furthermore, IGF failed to pursue the remedies available to it before the Second Circuit. IGF could have moved for reconsideration or petitioned the Second Circuit for an en banc hearing to reconsider its policy of allowing summary decisions. IGF, however, pursued none of these avenues, similar to the way that it failed to avail itself of discovery or to obtain an expert at the district court level. IGF's litigation strategy appears to be refusing to help itself to the remedies available, only to argue later to a higher court that it was unfairly treated. Having declined to seek the Second Circuit's consideration of its rule concerning summary decisions, it is inappropriate for IGF to raise the issue for the first time in a Petition for Certiorari to this Court.

II.

THE DISTRICT COURT CORRECTLY STATED AND APPLIED PRECEDENT OF THE SECOND CIRCUIT WHICH ADHERES TO THE PRINCIPLES ESPOUSED BY THIS COURT.

Contrary to IGF's suggestion, the district court's decision is fully consistent with the decisions of this Court. The district court's opinion quoted the Second Circuit's standards for granting summary judgment as follows:

> First, summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. F. Civ. P. 56(c). Second, the burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists. In considering that, third, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. Fourth, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational [factfinder] could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is appropriate. *Gallo v. Prudential Residential Svcs.*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) (citations omitted).

(A-6). The Second Circuit's summary judgment standard in *Gallo* fully comports with the summary judgment standards in Federal Rule of Civil Procedure 56 and announced by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The crux of IGF's petition is a factbound claim that both the district court as well as a unanimous panel of the Second Circuit misapplied the summary judgment standard. IGF alleges no confusion or conflict in the lower courts about the meaning of the summary judgment standard or how it is to be applied. Thus, there is no cause for review by this Court.

In addition, the decision below was plainly a correct application of law. Through Dr. Froot's affidavits, Morgan Stanley demonstrated that IGF's system was not entitled to protection for two independently sufficient reasons: (1) it was not novel and original; and (2) it did not confer a competitive advantage. First, Morgan Stanley provided several examples of catastrophe bond offerings prior to June 1995, when IGF purportedly disclosed its system to Morgan Stanley. (A-7 – A-8). Second, Morgan Stanley also demonstrated that Dr. Froot himself authored an article in 1995 disclosing all essential elements of IGF's system. (A-9 – A-10). Third, Dr. Froot offered other financial products embodying the characteristics of IGF's technology that predated the purported disclosure to Morgan Stanley. (A-10 – A-11). Through this uncontested testimony, Morgan Stanley demonstrated that IGF's system was neither novel nor original.

Morgan Stanley also demonstrated through Dr. Froot's affidavits that IGF's system conferred no competitive advantage. First, he pointed out that the proposals that other investment banks submitted to the CEA contained similar

features to the features in the Morgan Stanley proposal, and in fact, two proposals — from CS First Boston and Goldman Sachs — contained all four elements of the IGF system. (A-12). Thus, no competitive advantage could have existed. Therefore, because Morgan Stanley filed a properly supported motion for summary judgement showing no genuine issue of material fact existed, the burden shifted to IGF to demonstrate all the material elements of its cause of action. *See Celotex*, 477 U.S. at 323. Thus, IGF's attempt to assign error for improper "burden shifting" by the district court (Pet'r Brief at 18) is plainly incorrect.

Although IGF never designated Love, King and Szal as experts nor submitted reports, in an attempt to oppose Morgan Stanley's well-supported motion, IGF submitted declarations of these principals of the company and asserted, for the first time, that the court should regard them as experts. Because IGF failed to identify these so-called experts and to submit expert reports in accordance with the Joint Discovery Plan, the district court would have been justified in rejecting the declarations of IGF's principals. Despite these defects, the district court nevertheless considered the declarations and made proper evidentiary rulings rejecting much of their contents as containing conclusory statements, unsupported opinions and hearsay. (A-8 – A-12). While the district court was required to, and did, give IGF the benefit of all justifiable inferences, it was not required to deny summary judgment based on hearsay, conclusory assertions and affidavits that did not set forth admissible evidence. *See* Fed. R. Civ. P. 56(e); *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997); *see also United States v. United States Gypsum Co.*, 340 U.S. 76, 85 (1950) (explaining that the right to present evidence to a court on summary judgment does not require the court to admit irrelevant evidence).

The declarations of IGF's principals were insufficient to establish the system's novelty and originality. In response to IGF's claim that Dr. Froot relied on only a few lines of the description of its system given in the answers to interrogatories, the district court stated: "the remainder of that response adds no detail or helpful explanation. Quite simply, IGF has failed to articulate precisely what proprietary technology it had which Morgan Stanley allegedly misappropriated." (A-11). Dr. Froot's focus on the four elements of IGF's system was justified since IGF itself identified these elements in its interrogatory answer. Furthermore, although IGF claimed through the declarations of King and Szal that five other banks received IGF's technology under confidential conditions, the district court found no evidence to support the argument.

It is rudimentary that bald assertions and unsupported conjecture are insufficient to oppose summary judgment. *Anderson*, 477 U.S. at 249-50; *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991). The affidavit of Dr. Love, IGF's chief investment officer, contained precisely the type of unsupported statement that is prohibited. In substance, Love asserted that IGF's system was different from the past technology but did not explain how it was different. The district court observed that Love failed to address "how IGF's system differs from the concepts detailed in Dr. Froot's article. Nor does IGF deny that the four concepts identified by IGF as being key to its proprietary system were included in . . . Froot's article." (A-10). Additionally, Love attempted to overcome the fact that by June 1995, financial products containing the IGF characteristics existed. The court opined that Love stated only generally that the products described by Dr. Froot do not contain integral elements of IGF's system but he failed to explain what those purportedly missing

elements are: "These assertions, without evidentiary support, do not raise genuine issues of material fact." (A-10 – A-11) Thus, the district court read and considered Love's affidavit and the affidavits of the other two IGF principals but found them insufficient to establish that IGF's system was novel and original or to otherwise create a genuine issue for trial.

Furthermore, IGF failed to raise a genuine issue of material fact as to Dr. Froot's testimony that its system did not convey a competitive advantage. Although IGF argued that the CEA project led to more business for Morgan Stanley, the district court found that IGF offered no evidence to support the contention nor any evidence demonstrating any economic gains to Morgan Stanley as a result of winning the CEA project. In fact, the CEA eventually abandoned its plans to issue catastrophe bonds and instead opted for a traditional reinsurance mechanism. IGF also made the unsupported claim that Morgan Stanley's lack of full understanding of the IGF technology caused the CEA to abandon the proposal. The district court, however, found "no explanation of what was misunderstood and no evidence to support IGF's statement." (A-13). Just as IGF failed to depose Dr. Froot, it likewise failed to seek depositions from the CEA, which would have provide IGF with an opportunity to find out why the CEA initially chose Morgan Stanley and why the project was eventually abandoned. Therefore, IGF also failed to establish that its system conferred a competitive advantage.

Morgan Stanley's properly supported motion for summary judgment shifted the burden to IGF to establish the elements of its cause of action. In response, IGF offered bald assertions, conclusory statements and hearsay from three of its principals, posing as experts. Rather than dismissing

the declarations outright, however, the district court considered them but, for the reasons summarized above and contained in the opinion below, found them insufficient to establish the elements of IGF's claims or to otherwise raise genuine issues for trial. Thus, summary judgment was proper.

III.

THERE IS NO CONFLICT BETWEEN THE DISTRICT COURT'S DECISION AND THE AUTHORITY OF THIS COURT OR THE CIRCUIT COURTS.

IGF incorrectly contends that the summary judgment standard applied by the court below is in "direct conflict with prior controlling decisions of this Court" and the Second Circuit's adoption of the opinion below created a "*de facto* conflict among the circuits." (Pet'r Brief at 8, 9). To the contrary, as shown above (*supra* pp. 10-14), the court below correctly applied the Second Circuit's standard for summary judgment as set out in *Gallo*, 22 F.3d at 1223-24, which faithfully adheres to the precedent of this Court. Further, it is completely consistent with the summary judgment standards of other circuits and with Federal Rule of Civil Procedure 56. Thus, no inconsistencies exist between the decisions below and authority of this Court or among the courts of appeals.

While IGF creatively asserts a de facto circuit split concerning the standards for summary judgment, it cites no caselaw to elucidate exactly which circuit courts are in conflict, what the respective standards are or how they differ. The simple explanation for the lack of detail surrounding this purported "*de facto* circuit split" is that this Court's long-standing precedents for summary judgment are reflected in the Federal Rules of Civil Procedure and have been adopted by every

circuit, including the Second Circuit. These standards have been cited and applied on countless occasions by all of the district courts, including the Southern District of New York.

IV.

THE DECISIONS BELOW WILL NOT HAVE FAR REACHING IMPLICATIONS SINCE THEY WERE BASED UPON THE UNIQUE FACTS OF THIS CASE.

IGF's Petition, if granted, would require this Court to undertake a fact-specific review and comparison of affidavits and declarations filed in connection with a summary judgment motion. These voluminous materials — which are not included in IGF's Appendix — were in the record considered by both the district court and the Second Circuit. IGF's petition does not set out a valid reason for yet further review by this Court, which in any event has held that it does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). As explained above, the district court, and the Second Circuit by adopting the district court's opinion, correctly decided that Morgan Stanley was entitled to summary judgment. Even if the case had been erroneously decided, however, granting certiorari is still not warranted.

CONCLUSION

For the reason given above, IGF's petition for a Writ of Certiorari should be denied.

Respectfully submitted,

C. JOSEPH LAUGHON, II
Counsel of Record
ROBERT PENCHINA
LAURA M. BERGAMINI
CLIFFORD CHANCE ROGERS
& WELLS LLP
Attorneys for Respondent
200 Park Avenue
New York, New York 10166
(212)878-8000